



The Appeals Board adopts the stipulations listed in the January 6, 1994, Award of the Administrative Law Judge.

### **ISSUES**

The limited stipulations left in dispute ten issues listed by the Administrative Law Judge in his Award. The Administrative Law Judge made findings on each of those issues. However, the Administrative Law Judge also found that the claimant was an independent contractor, not an employee of the respondent. Because the Appeals Board has agreed with that portion of the decision by the Administrative Law Judge, the review of other issues is considered unnecessary.

Before addressing the substantive issues, claimant challenges the authority of the Administrative Law Judge to make any decision in this case. Claimant had twice made demand for transfer of this case pursuant to K.S.A. 44-523(c) and contends that request acts to immediately remove the case from the initial Administrative Law Judge.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1) As claimant points out, K.S.A. 44-523(c) provides that when an award is not made within thirty days and a request is made to reassign the case, the "director shall assign the matter to an assistant director or a special administrative law judge . . . ." The Appeals Board does not, nevertheless, consider the request for reassignment to deprive the initial Administrative Law Judge of jurisdiction. The initially assigned Administrative Law Judge retains jurisdiction until the Director transfers the case.

(2) For the reasons set forth below, the Appeals Board finds that claimant was an independent contractor of the respondent, Bartel Sales and Service and therefore not entitled to workers compensation benefits.

Claimant was injured on February 12, 1992, in an explosion which occurred while he was working in a garage at his home. The evidence indicates that a spark from equipment he was operating ignited gasoline to cause the explosion. Claimant suffered burns from his neck to the top of his thighs.

Respondent contends that at the time of the injury the claimant was acting as an independent contractor for respondent, not as an employee. The distinction between employee and independent contractor is generally understood to primarily turn on whether the respondent has the right to control. To make the relationship one of employment, the right to control is to be the control over the manner or method of performing the duties, not merely the result. See, Evans v. Board of Education of Hays, 178 Kan. 275, 284 P.2d 1068 (1955); Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Factors such as payment by time rather than by project, furnishing tools or equipment, right to discharge employees, or relative expertise of the parties, are considered either as indication of the right to control or otherwise tending to establish whether it is an employment or independent contractor relationship. See, McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965).

The Appeals Board concludes that on balance the claimant can be more accurately described as an independent contractor than as an employee. The business in which the parties were engaged was one in which the respondent would purchase wrecked vehicles

and deliver them to claimant or others for repair work to be done before placing them back into the market to be sold. Claimant was only one of a number of individuals who performed repair work for respondent. Claimant's work was limited primarily to straightening frames.

Factors tending to support the finding claimant was an independent contractor include the fact that the work was done at claimant's home in his own garage. The evidence indicates the vehicles were delivered by respondent, left, and not dealt with by respondent again until the work was done and they were picked up. Although claimant understood he was paid on a weekly basis with annual bonuses, respondent testified that claimant was paid on a per-piece basis with weekly checks as an advance. According to respondent, the annual payment at the end of the year was not a bonus but an adjustment to make up for what was not covered by the weekly payments. Respondent also indicated that he paid others on a strictly per-piece basis but paid claimant the weekly advances at claimant's request because claimant had stated he was otherwise unable to manage his money.

Respondent did not withhold any taxes but sent a 1099 form at the end of each year showing the total amount paid to claimant. Those forms indicate that the sums paid were "non-employee compensation." Claimant indicates he made quarterly payments for income tax and self-employment tax. Hospital records indicate claimant described himself upon admission as a self-employed auto-body repairman. The evidence generally indicates that although claimant was expected to work forty hours each week, he made his own decisions about what time and what days he would work those hours. Both parties supplied tools and equipment.

There is, within the record, evidence of other factors which would suggest that claimant was acting as an employee rather than an independent contractor. However, the Appeals Board has concluded that the evidence taken as a whole indicates claimant is best and most accurately described as an independent contractor, not an employee.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge Alvin E. Witwer dated January 6, 1994, is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 1994.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

cc: Richmond M. Enochs, PO Box 12290, Overland Park, KS 66282  
Mark E. Kolich, PO Box 171855, Kansas City, KS 66117-1855  
Jeffrey A. Dehon, 831 Armstrong Avenue, Kansas City, KS 66101  
Alvin E. Witwer, Administrative Law Judge  
George Gomez, Director